

**REVISED MINUTES OF THE
JUDICIARY INTERIM COMMITTEE**

Wednesday, May 22, 2002 – 9:00 a.m. – Room 403 State Capitol

Members Present:

Sen. David L. Gladwell, Senate Chair
Rep. Glenn L. Way, House Chair
Sen. D. Edgar Allen
Sen. Millie M. Peterson
Sen. Terry R. Spencer
Sen. Michael G. Waddoups
Rep. Patrice M. Arent
Rep. Chad E. Bennion
Rep. Ron Bigelow
Rep. Katherine M. Bryson
Rep. Greg J. Curtis
Rep. Scott Daniels
Rep. James A. Ferrin
Rep. Ben C. Ferry

Rep. Neal B. Hendrickson
Rep. Eric Hutchings
Rep. Mike Thompson
Rep. A. Lamont Tyler
Rep. David Ure

Members Absent:

Staff Present:

Mr. Jerry D. Howe, Research Analyst
Ms. Esther D. Chelsea-McCarty, Associate General Counsel
Ms. Glenda S. Whitney, Legislative Secretary

Note: A list of others present and a copy of materials can be found at <http://www.image.le.state.ut.us/imaging/history.asp> or by contacting the committee secretary, Glenda Whitney, at 538-1032.

1. Call to Order and Committee Business

Chair Way called the meeting to order at 9:15 a.m.

MOTION: Rep. Bennion moved to approve the minutes of the April 24, 2002 meeting. The motion passed unanimously, with Sen. Gladwell, Sen. Spencer, Rep. Curtis, Rep. Hutchings, Rep. Tyler, and Rep. Ure absent for the vote.

2. Judicial Conduct Commission

Mr. Gary Doxey, Legal Counsel, Governor's Office, explained three conceptual ideas that the governor's office believes should form the foundation of any judicial disciplinary system. The three concepts, he said, are independence, accountability, and fairness. Judicial independence, the ability for judges to issue decisions based on the facts of the case and the law is such an important principle of our democracy that it should not be the basis for judicial discipline. The judiciary, he said, should not be dependent on the majority political view.

Mr. Doxey rhetorically questioned whether a judiciary can be both independent and accountable for misconduct. In our system, like in many other states, a Judicial Conduct Commission is created to hold judges accountable, but he said, judges should not be accountable for legal decisions. The proper way to hold a judge accountable for a legal decision is by appeal, he said. That is why we have a Court of Appeals and a Supreme Court. Conversely, the proper way to hold a judge accountable for misconduct that is based on a violation of the Code of Judicial Conduct or a criminal act, is a Judicial Conduct Commission.

Whatever judicial disciplinary process is selected to make judges accountable for misconduct needs to have an element of basic fairness to protect judges against mean-spirited complaints, he said. Because judges are ethically prevented from either publically speaking out on cases or to defend themselves when accused of misconduct it is critical to retain the presumption of innocence until proven guilty. Judges should be protected from irreparable damage that can be done from an inquisitorial "witch hunt" motivated by political ideology, or any other complaints filled against a judge intended to pressure the judge on a particular case. Investigatory powers of the Judicial Conduct Commission ought to be limited, he said. Judges may even deserve greater protections than the average citizen, he said, because of the nature of their service to the state. A Judicial Conduct Commission he said, needs to have a process that protects judges, which does not open them up to public scrutiny for unfounded allegations.

There is presently some concern in the executive branch of the inquisitorial nature of our current statutes. Part of that concern is created by a fact finder who is also prosecutor and judge. The European System still merges the fact-finder/investigator which has the advantage of being efficient, but the disadvantage is the potential for bias. He said that without that separation one gets some efficient results but not always fair results. Our justice system has favored a separate investigator, prosecutor, and judge. It makes our democracy safe.

In response to a question by Sen. Waddoups, Mr. Doxey reiterated that the governor is concerned about the encroachment on the independence of the judiciary and concerns generally with the Judicial Conduct Commission. He emphasized the importance of a separation between the investigatory functions and prosecutorial functions of the Judicial Conduct Commission.

Sen. Waddoups acknowledged that the Judiciary Interim Committee also has some concerns and it will push forward so he encouraged the Governor's Office to keep itself apprized.

Rep. Bryson asked why the executive branch vetoed H.B. 136 in 2002 when its primary concerns were apparently created by H.B. 285 in 2000. Mr. Doxey explained the difficulty of reviewing all issues within every bill. He said there was some discomfort with H.B. 285 but it did not seem politically prudent to veto that bill, but H.B. 136 raised similar issues and the governor felt compelled to veto it.

Rep. Hendrickson asked Mr. Doxey if the governor would support a two-tier Judicial Conduct Commission. The first tier, he said, would perform the investigations and the other tier would perform adjudications. Most states that have a two-tier system make the formal charges public when and if the complaint moves to the second, adjudicative tier, he said, and the Supreme Court's often have less review of the second tier than Utah's Supreme Court has over our Judicial Conduct Commission. Is that a system the governor's office would support? Mr. Doxey indicated that a separation in the investigation and adjudicative functions could be a good move but any proposal would need to be reviewed.

Rep. Ferrin asked Mr. Doxey what type of judicial disciplinary system he would recommend. Mr. Doxey explained that the worst systems subject judges to partisan political ideologies. The best systems, like the

federal system, give a high degree of latitude to judges in terms of the decisions they make, the processes they go through to reach those decisions, yet hold judge's accountable for misconduct.

Rep. Ferrin asked Mr. Doxey if he supported life appointment for judges in the state system. Mr. Doxey said it has a lot of virtues but it has some risk. The life appointment in the federal system is subject to some accountability within the judiciary itself which scrutinize the behavior of judges, but it does have some protections for judicial independence which offsets the risks, he said.

Mr. Blake S. Atkin, Trial Lawyer, distributed a handout containing written comments. He said there are some significant points of structure and procedure in the Judicial Conduct Commission which do not give the judges any assurance that they are being judged fairly and impartially, but instead create grave doubt that impartiality can be achieved. He addressed five primary concerns:

- S The Judicial Conduct Commission has authority to initiate complaints that it will adjudicate
- S There is no separation of functions in the Judicial Conduct Commission. The same body acts as investigator, prosecutor, and adjudicator
- S No gate keeping—all complaints, no matter how frivolous, go to the full Commission
- S Judges are given no resources to defend themselves and no reimbursement if they prevail
- S Secrecy creates influences on decision-making that cannot be countered, a judicial conduct commission should not conduct its business in secret

Mr. Atkin commended the Judiciary Interim Committee for its efforts in attempting to meet the fine balance required to provide accountability for judges while scrupulously protecting the independence of judges.

To Mr. Atkin's comment that judges do not get time off work to prepare a defense against complaints before the Judicial Conduct Commission and that judges must pay attorneys fees out of their own pocket, Rep. Ure questioned whether government funds should be used to defend judges accused of civil misconduct. In the real world government does not give people time off work or pay attorneys fees for civil actions. Rep. Ure also commented on a special task force which decided by one vote the issue of when confidentiality ought to cease. Rep. Ure told Mr. Atkin that every judge in the State will be coming after you, if you advocate making this process open to the public.

Rep. Ure explained that there are good reasons to keep portions of the disciplinary process confidential. Judicial independence is served by some level of secrecy, he said. Judges deserve protection from numerous frivolous complaints. A two-tier system might help, but it would probably cost more money, and one would likely lose some Supreme Court oversight with a two-tier system. Do we want a two-tier system independent of the Supreme Court or do we want our system with substantial Supreme Court oversight he asked. This is an important question on how to improve this process.

Mr. Atkin countered that judges are public servants who deserve better treatment. He said a judge takes a pay cut to become a judge, and his resources become quite limited as compared to when he was in

private practice, so there ought to be time off work to prepare for proceedings before the Judicial Conduct Commission. Attorney fees are expensive, he added, and judges shouldn't pay those fees out of their own pocket. Judicial independence requires that judges should not be influenced in their legal decisions. Fear of being dragged before the Judicial Conduct Commission for the content of one's legal analysis which may cost the judge both time and money inappropriately influences judicial independence, he said.

Rep. Ure responded by stating that Mr. Atkin misunderstands the issue. Judges have no reason to fear that unsubstantiated complaints will cost them either time or money. Judges are not accountable for their legal decisions, in fact numerous complaints are dismissed out of hand each month which do not cost the judge either time or money. Yet, he said, it would be inappropriate to dismiss a complaint that was not frivolous on its face. Some complaints, he said, simply require additional information before one can make an informed decision as to whether or not the complaint should be dismissed. The process of seeking additional information is a preliminary investigation. Arguments that one tier systems are inherently biased is an argument that has been rejected by every Supreme Court that has heard it, he said.

MOTION: Rep. Ure moved the Judiciary Interim Committee form a subcommittee comprised of judges, legislators and bar commissioners to review Article VIII, Section 13, its implementing statutes, and Administrative Rules with the intent of creating an efficient and fair judicial disciplinary process which holds judges accountable for misconduct.

Mr. Howe explained that the Judiciary Interim Committee can request from the Management Committee permission to create a Subcommittee, but under legislative rules the Judiciary Committee cannot create one itself. After committee discussion, Rep. Ure withdrew the motion so that a letter may be drafted to the Management Committee seeking permission for a Subcommittee to be created.

Ms. Sylvia Bennion, Vice Chair, Judicial Conduct Commission, said that the Judicial Conduct Commission was created by the Judicial Article rewrite, and there was very little statutory or constitutional guidance. It has been a difficult proposition to establish appropriate guidelines, she explained. In the course of creating its processes, she explained that the Commission has always worked in good faith to balance fairness to judges with its constitutional obligation to provide orders of discipline for judicial misconduct. In return for their service, which is time consuming and difficult, she emphasized that members of the Commission do not receive any benefits.

Mr. David Bird, Attorney and member of the Judicial Conduct Commission, distributed and reviewed a flow chart explaining the process the Commission uses to consider a complaint against a judge. He explained that the Commission handles about 100 complaints a year. Referring to Article VIII, Section 13, Mr. Bird explained the constitutional obligations of the Judicial Conduct Commission and the Supreme Court's responsibility of oversight. Mr. Bird indicated that the term "investigation," could use some clarity, as could the term "complaint."

Mr. Bird explained that a one-tier conduct commission may not be the best, but they have been constitutionally upheld by every state in which the system has been challenged. He said the question the Legislature needs to ask itself, is what are we willing to trade off in terms of cost versus appearance of impropriety to try and build a better system. He said there are a lot of allegations of impropriety regarding the Judicial Conduct Commission—not only have some judges been critical of it, but even the Legislature has been critical. The commission does the best it can do with the resources it is given, he said.

Sen. Spencer suggested that it might be wise to allow an accused to judge take his case to the District Court instead of staying within the Judicial Conduct Commission. If a judge would prefer District Court, that option could be available if the judge is willing to sacrifice the confidentiality of the Judicial Conduct Commission, he said.

Mr. Howe distributed a handout "Bifurcated judicial discipline systems" which, he said, contains an explanation of both two-tier and two-panel judicial disciplinary systems. Of central importance, he said, is the introductory paragraph which states that the argument that one-tier Judicial Conduct Commissions violate due process rights has been rejected by every Supreme Court that has considered it because the decisions of the commission in one-tier systems are reviewed by the Supreme Court.

3. Condemnation

Chair Way said this agenda item will be discussed at a future meeting.

4. Divorce, Child Support, and Visitation

Ms. McCarty referred to the Judiciary Interim mailing packet and identified bills that were introduced during the 2001 General Session but did not pass. She said that H.B. 37, Parent-Time Amendments, came out of the Judiciary Interim Committee. She indicated the S.B. 168, 1st Sub. Parent Visitation Office, H.B. 332, Child Support Modifications, and H.B. 355, Child Support Guidelines were not products of the Judiciary Interim Committee but were on topic. Ms. McCarty distributed a handout "Focus: Children & the Other Parent," with a compilation of suggested statutory changes for the committee to review.

Rep. Ferrin discussed H.B. 37 and said that he would be working with the Legislative Fiscal Analyst Office on the fiscal note and is planning on rerunning the bill next year.

Sen. Allen discussed Sub. S.B. 168, and said that this bill may have passed if the amount of filing fees had been covered and requested continued review by this committee.

Rep. Hutchings discussed H.B. 332 and requested further review on the bill.

Ms. McCarty reviewed Rep. Fife's bill, H.B. 355, and explained the technical issues and the reported difficulty in determining Utah specific child support data.

Mr. Mark Shurtliff, Attorney General, brought to the attention of the committee concerns that S.B. 168 would require additional attorneys to meet its mandates. He asked Ms. Karma Dixon, Chief, Division of Child and Family Support Services, Attorney General's Office, to address specific concerns.

Ms. Dixon explained that the way S.B. 168 is written indicates that the Attorney General's Office will be the enforcement component of a visitation office and that the attorneys may be required to take matters to court. She explained the fiscal impact this bill would have.

Mr. Shurtliff said the current Child and Family Support Division cannot handle these cases because they are all paid through dedicated credits. He explained that there would basically have to be an entirely new division created to handle all the evidence and hearings. He estimated that just for Salt Lake County would require five entry level attorneys to properly meet the mandates of this bill.

Chair Way took public comment from members of the group "Focus: Children & the Other Parent," who expressed concerns and support for the study of legislation regarding non-custodial parents.

5. Right to a New Judge

Mr. Fran Wilkstrom, Chair, Supreme Court Advisory Committee on the Rules of Civil Procedure, distributed a copy of his written remarks, which he asked staff to read because he was suffering from laryngitis. Mr. Howe read his comments which are on file in the Office of Legislative Research and General Counsel. Mr. Wilkstrom attempted to answer questions at the conclusion of his testimony.

Sen. Waddoups asked where the request to study this item came from. Mr. Howe explained that the issue had been prioritized by the committee at its last meeting as the 2nd most important item.

MOTION: Rep. Daniels moved to not consider further study on "Right to a New Judge" during the 2002 interim. The motion passed, with Rep. Bryson and Rep. Thompson voting in opposition. Sen. Spencer, Rep. Arent, Rep. Bigelow, Rep. Curtis, Rep. Tyler, and Rep. Ure were absent for the vote.

Mr. Howe noted that the Legislative Management Committee requested that the Judiciary Interim Committee add to its agenda "Separation of Powers." Chair Way informed the committee that the chairs will consider this item as time permits.

6. Adjournment

MOTION: Sen. Peterson moved to adjourn the meeting. The motion passed unanimously, with Sen. Spencer, Rep. Bigelow, Rep. Curtis, Rep. Tyler, and Rep. Ure absent for the vote. Chair Way adjourned the meeting at 11:35 a.m.